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June 25, 2004

Angela C. Snyder
Office of the Deputy Administrator
Poultry Programs
Agriculture Marketing Service
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
STOP 0256, Room 3932 -- South
Washington, D.C. 20250

Re: Comments submitted on behalf of Horizon Organic Dairy Regarding Proposed Rule to Exempt Organic Producers from Assessment by Research and Promotion Programs

These comments have been submitted via e-mail to: organicassessment@usda.gov and via Federal Express

[Docket Number PY-02-006] RIN 0581-AC15
Page 22689-22702 of the Federal Register Vol. 69, Number 80
Monday, April 26, 2004

For questions or clarification contact:

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Dear Ms. Snyder:

As attorneys for Horizon Organic Dairy, we write to support the comments submitted today by Horizon Organic Dairy. We have reviewed those comments and agree with them in form and substance. Moreover, we write to provide an additional legal perspective as to both the producer and processor comments and rewritten provisions proposed by Horizon Organic Dairy. As presently drafted, the proposed regulations concerning exemption from marketing order program assessments would, inadvertently we believe, simply result in no exemption for any entity realistically in business today. This simply cannot have been the intent of Congress and violates accepted rules of statutory construction including the plain meaning rule and the rule that all words used by Congress be given real weight.

For instance, and as clearly and amply described by Horizon Organic in its series of examples, unless the proposed regulation is rewritten, unrelated crop production, legally required treatment of sick animals, or attempts to expand organic production would prevent exemption from marketing assessments, even though the product for which exemption is sought is produced in 100% organic form. However, Congress' previous enactments and USDA's own regulation regarding such issues clearly permit organic producers to engage in unrelated non-organic crop production, require treatment of sick animals, and clearly anticipate the ability to expand organic production through transition from non-organic to organic production. Moreover, USDA's own conclusion that under the regulations as written no milk processor will presently qualify for the processor exemption proves that the regulation is simply drawn too narrowly as demonstrated by Horizon Organic's comments that it otherwise qualifies under USDA organic and milk pooling rules as an organic processor or handler.

The commonly applied rules of statutory construction require that every word Congress writes be given meaning. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). While one might argue that exemption language in statutes is to be read narrowly, in this instance the language must be read in light of the OFPA's rigorous certification program that already defines these organic entities. Moreover, the language cannot be read so narrowly, as is presently the case in the proposed regulations, as to write out the exemptions in their entirety. To do so would be to act as if the exemptions did not exist at all, thus unlawfully nullifying the plain meaning of the statute. *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (Congress is not presumed to do a futile thing).

Finally, certain commentators appear to wish to rewrite the statute to prevent certain corporate entities from receiving equal protection of the laws based upon a misperception of the exemption and its purpose. Nothing in the law permits USDA to make distinctions based on corporate structure. Moreover, OFPA exemptions are plainly available regardless of corporate structure so long as the person or entity is itself in 100% organic production in the relevant crop.

For these reasons and all the reasons stated in Horizon's comments, we respectfully urge adoption of the language as proposed by Horizon in lieu of the present restrictive language.

Respectfully submitted,

Charles M. English, Jr.

Wendy M. Yoviene

CME/sf
DC #170642 v1

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

Washington, D.C. 20250-0237

In the Matter of	)	**Docket Number:**
	)	**PY-02-006** [RIN 0581-AC15]
	)	
Proposed Rule To Exempt Organic	)	
Producers From Assessment by	)	
Research and Promotion Programs,	)	

COMMENTS OF CROPP COOPERATIVE

Respectfully Submitted,

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COMMENTS OF CROPP COOPERATIVE

RE: Docket Number PY-02-006

Proposed Rule To Exempt Organic Producers From Assessment by Research and Promotion Programs,

CROPP Cooperative respectfully submits these comments to the Agricultural Marketing Service ("AMS") regarding the above referenced docket and USDA's proposed rule implementing the Section 10607 of the 2002 Farm Bill (hereinafter "Exemption statute"). CROPP's previously submitted comments regarding the Proposed Rule to Exempt Organic Producers and Marketers From Assessments for Market Promotion Activities Under Marketing Order Programs; Federal Register, Volume 68, Number 231, Page 67381 (December 2, 2003) filed February 2, 2004 are attached hereto as Exhibit 1 and are incorporated herein by reference.

In its prior comments CROPP argued the definitions of the Farm Security and Rural Investment Act of 2002 ("FAIR Act"), when read together with the Organic Foods Production Act ("OFPA"), compelled the Secretary to give the widest possible application to the Exemption Statute. Those arguments are incorporated herein by reference and, additional arguments are advanced demonstrating that CROPP Cooperative's certified organic producers, and CROPP Cooperative itself as a certified organic fluid milk marketer/handler, are entitled to exemption from assessments under the Dairy Milk Promotion Order, 7 C.F.R. Part 1150 and the Fluid Milk Promotion Order, 7 CFR Part 1160. Similarly situated organic dairies are entitled to the same complete exemption.

CROPP Cooperative's "Organic Valley" label is the nation's largest farmer-owned certified organic brand. The Cooperative's membership includes nearly 600 organic family farms in 16 states. The Cooperative produces an extensive line of refrigerated dairy products, eggs, juices, produce and meat, all of which are certified organic. The Cooperative's total revenues were in excess of $155 million in 2003. Membership in the Cooperative is limited to qualified certified organic farmers. To qualify for membership, the farmer must be engaged in the production of certified organic agricultural products, meet the quality standards of the Cooperative, bear the risk of production, and reside in a region served by the Cooperative. The focus of the Cooperative is to provide certified organic products recognized by consumers as a trusted food source supporting family farms, humane treatment of farm animals, sustainable agricultural production, and environmental protection. CROPP's dairy products are 100% organic and CROPP does not produce or market non-organic products.

CROPP Cooperative believes that in order to ensure that the plain meaning of the Exemption statute to exempt certified organic farmers and eligible fluid milk processors from assessments under AMS research and promotion programs, and the intent of

Congress is satisfied, the Final Rule must be amended to accord with the following points.

SUMMARY

- A certified organic producer that produces and markets 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply, is eligible for the statutory exemption. If the producer is in possession of a certificate stating that the producer is certified in the production of 100% organic of the covered commodity, that producer is eligible for the exemption.

- A certified organic producer that produces 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply qualifies for the exemption without regard to whether the commodity is ultimately sold with an "organic" label affixed or in the conventional marketplace.

- Each organic producer that possesses a certificate from a USDA accredited certifier, that lists the particular commodities the producer can produce and market organically, and that does not operate a split-operation, should be required to only present that certificate to meet to qualify for the exemption. The continued eligibility of a certified organic producer to receive an exemption should turn on the continued certification of that producer, and not an annual review or renewal procedure adopted by the relevant commodity board.

- Congress intended certified organic fluid milk handlers/processors to be exempt from assessments imposed under the Fluid Milk Promotion Order, 7 C.F.R. Part 1160, because:

  - A fluid milk processor, defined in 7 C.F.R. § 1160.108[1], that pays the assessments under 7 C.F.R. § 1160.211 and that is a certified entity under the OFPA is a person eligible for the statutory exemption under the Proposed Rule without regard to whether the *facility* wherein the processing takes place also handles non-organic fluid milk because the certified entity processes and markets in consumer-type packages and pays assessments.

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[1] *See also e.g.* 7 U.S.C.A. § 6402(4)(statutory definition of fluid milk processor in Fluid Milk Promotion Act of 1990).

- A certified organic fluid milk processor/handler that markets nothing but certified organic milk products, is eligible for the statutory exemption under the Proposed Rule because Congress required only that the person seeking the exemption market "solely 100% organic products" and did *not require* that the marketed organic products bear labels stating "100% organic" under the NOP labeling rule. Thus a person seeking an exemption that sells "organic milk" is eligible for the exemption. *Compare* 7 C.F.R. § 205.301(a) (labeling "100% organic") with 7 C.F.R. § 205.301(b)(labeling 95% organic).

I. Introduction

In its 2002 Farm Bill, Congress amended Section 501 of the FAIR Act by adding Section 10607, entitled Exemption of Certified Products From Assessments. Section 10607 exempted from assessments imposed by AMS programs all organic products. On April 26, 2004, the Agricultural Marketing Service of USDA opened Docket Number PY-02-006 to implement Section 10607 of the Farm Bill of 2002 and fixed a 30-day comment period. *See* Fed. Register, Volume 69, Number 80, p. 22690 (hereinafter "proposed rule"). The time for comment submission was subsequently enlarged up to and including June 25, 2004. *See* Fed. Register, Volume 69, No. 102, Page 29907 (May 26, 2004). The proposed rule addresses exemptions for organic entities from assessments under sixteen research and promotion programs.

The Exemption Statute provides:

> (e) Exemption of certified organic products from assessments
>
> (1) Notwithstanding any provision of a commodity promotion law, a person that produces and markets solely 100 percent organic products, and that does not produce any conventional or non-organic products, shall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm (as defined in section 6503 of this title).[2]

Relying on the distinction between certified organic and generic commodities it created with the 1990 Organic Foods Production Act ("OFPA"), Congress amended the FAIR Act by exempting certified organic products from all assessments arising from generic research and promotion laws. The policy rationale behind the Exemption statute is that organic producers, processors and their consumers do not benefit from non-organic commodity research and promotion programs. The two dairy-related programs affected, the Dairy Milk Promotion Order, 7 C.F.R. Part 1150 and the Fluid Milk Promotion Order, 7 C.F.R. Part 1160, lead to manipulation of the marketing and pricing of non-organic commodities, and do not maintain or expand markets for organic products.

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[2] 7 U.S.C. § 7401(e)(1).

As in all statutory construction matters, the Secretary must begin with the language of this statute, and the controlling statutory regime into which this amendment fits. *See e.g. Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)(noting the first step "is to determine whether the language at issue has a plain and unambiguous meaning"). The Exemption statute, while not particularly well drafted, is not ambiguous. *See e.g. INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987) (deference to agency interpretation only arises when statute is ambiguous). Congress left only a small gap in its organic exemption agenda, leaving to the Secretary the duty only to confer the full benefit intended, and to ensure it is widely and timely conferred. The eligibility criteria for the organic exemption are established by Congress in the Exemption statute and the Secretary must faithfully implement these criteria.

II. Specific Comments

A. Congress Recognized a Separate and Distinct Organic Marketplace when it Adopted the OFPA in 1990.

Congress recognized in 1990 the existence of the separate market for organic products because an organic product is a unique agricultural commodity compared to its non-organic, or conventional counterpart. Organic agriculture represents a method of production that is meticulously regulated and is subject to scrutiny by USDA accredited certifiers throughout the nation. It is a system that "integrat[es] cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity." 7 C.F.R. § 205.2. The "organic product" represents the end result of the process, and Congress has recognized that the final product is distinct from the product of conventional agriculture, and certified organic agricultural commodities are the only commodities that may be sold in this legally distinct marketplace, as defined by Congress. *See* OFPA, 7 U.S.C. § 6501 *et seq.*; *see also Pringle v. USA,* 1998 U.S. Dist. Lexis 19378 (awarding higher disaster benefits to organic farmers based on the higher value of the organic crop and finding the organic market distinct and a special end use).

The Organic Foods Production Act of 1990 (OFPA) was enacted, "to establish national standards governing the marketing of certain agricultural products as organically produced products." 7 U.S.C. § 6501(1). In order to clearly distinguish generic agricultural commodities from organic agricultural commodities Congress preempted the field and forbid the use of the term "organically produced" unless it meant "an agricultural product that is produced and handled in accordance with this chapter." 7 U.S.C. § 6502 (14). Products not meeting the standards set forth in the OFPA may not be "sold or labeled as an organically produced agricultural product." 7 U.S.C. § 6504; *see also* 7 U.S.C. § 6505 (compliance requirements); *accord* 7 C.F.R. Part 205 (National Organic Program); 7 C.F.R. § 205.100 (What has to be certified); 7 C.F.R. § 205.102 (Use of the Term Organic) To ensure the borders of the separate market for organically produced products are maintained, Congress imposed a civil penalty of up to $10,000 for selling or labeling generic agricultural commodities or products as organically produced.

See 7 U.S.C. § 6519(1) (Violations of chapter, Misuse of Label) 7 C.F.R. § 205.100(c)(Penalty for misuse of organic in sale or labeling).

B. Several Initiatives in the 2002 Farm Bill Demonstrate Congress's Continued Treatment of Organic Commodities as a Separate and Distinct Class of Products and the Exemption Statute must be Implemented Against this Legal and Policy Backdrop

In addition to the Exemption Statute, the 2002 Farm Bill contains several initiatives by Congress that support the development of organic production methods and domestic and international markets for organically produced and handled agricultural commodities.

- Organic Agriculture Research and Extension Initiative. *See* § 7218
- Organic Production and Market Initiatives. *See* § 7407
- International Organic Research Collaboration. *See* § 7408
- Report on Producers and Handlers of Organic Agricultural Products. *See* § 7409
- National Organic Certification Cost-Share Program. *See* § 10606

Each of the foregoing amendments adopted by Congress in 2002 demonstrates two key features of U.S. agricultural policy:

- continued Congressional recognition of and support for the organic production methodology as a separate and unique production technique, distinct from the conventional agricultural method, and,
- continued Congressional recognition that organically produced and handled agricultural commodities constitute a separate and unique market that is characterized by vibrant competition and is best served by an independent marketing framework.

Congress recognized that organic commodities do not benefit from the generic promotional efforts supported by the research and promotion programs because organic producers do not market their products in the "conventional" marketplace. Because they are unable to take advantage of these programs, and do not benefit from these efforts, Congress removed the obligation to contribute to these efforts through the assessments. Congress's recognition that the two dairy program assessments referenced herein do not benefit the organic producers, the organic processors and handlers, nor their consumers, is consistent with the U.S. Supreme Court's characterization of related marketing programs. *See e.g. Glickman v. Wileman Brothers and Elliot Inc.,* 521 U.S. 457, 461

(1997)(citing 7 U.S.C. § 602(1)(noting marketing programs benefit only those "producers in a particular market").

C. Commodity Promotion Laws are Enacted on a Specific Commodity by Commodity Basis, and the Exemption Statute Must be Implemented on the Same Commodity-by-Commodity Basis.

There is no disputing that commodity promotion laws are "designed to maintain or expand markets and uses *for that commodity,*" and Congress has consistently adopted commodity specific marketing order statutes to minimize their market distorting influence. *See generally* U.S. CODE, TITLE 7, CHAPTER 101, Agricultural Promotion); TITLE 7, SUBCHAPTER II (Canola and Rapeseed); TITLE 7, SUBCHAPTER III (kiwifruit); TITLE 7, CHAPTER 90 (Mushrooms); TITLE 7, CHAPTER 91 (Limes). Congress has also commanded the funds gathered pursuant to assessments imposed under these programs be expended only to advance the markets for the designated commodity. *See e.g.* 47 U.S.C. §7414(e)(Activities and Budgets requiring each board submit a budget for "promotion, research, or information *relating to the commodity covered by the order.*") The Department's regulations have faithfully implemented those statutes on a commodity by commodity basis. *See e.g. generally* 7 C.F.R. Chapter IX, Parts 900-999 (fruit and vegetable marketing orders; regulations issued commodity by commodity); *See also* 7 U.S.C. §7401(b)(Congressional findings that repeatedly limit the reach of generic commodity promotion programs to the "covered commodities" and commodities "covered by the law"); 7 U.S.C. §7401(b)(4)(findings respecting the "commodity covered by the law"); (b)(6) (same); (b)(7)(findings noting promotion programs are intended to expand market "for that commodity")

The commodity by commodity approach, and the deployment of the assessments to benefit only the subject commodity, has been recognized by the U.S. Supreme Court. *See Glickman v. Wileman Bros. and Elliot Inc.*, 521 U.S. 457, 461 (1997) (finding the commodity-specific programs serve the economic interests of the producers of each program commodity and are "paid from funds collected pursuant to the marketing order."); *accord* 7 U.S.C. § 7416(a)(requiring assessments be paid to specific marketing board) The policy underpinnings of the commodity by commodity approach maximizes "the producers' common interest in disposing of their output on favorable terms" while minimizing the extent to which "economic regulation...has displaced competition," in the overall food market. *Glickman,* 521 U.S. at 462 As the Secretary considers implementation of the Exemption statute as it relates to the two referenced dairy programs, she must recognize that the entire economic rationale for such programs is underpinned by a commodity-by-commodity approach that mandates adherence in this rulemaking.

1. The Exemption Statute Must be Implemented in Light of the Existing Commodity by Commodity Approach to Comport with Congressional Intent and the Secretary's Prior

Implementation of the Dairy Milk Promotion Order and the Fluid Milk Promotion Order.

The first clause of the Exemption Statute states a person shall be exempt from assessment if that person "produces and markets solely 100 percent organic products." 7 U.S.C. § 7401(e)(1). It is irrelevant that the producer also sells *other* commodities that are not certified organic because the commodity by commodity approach controls. If the agricultural commodity is produced on a certified organic farm, that producer is marketing "100 percent" organic products. The commodities that are organically produced on a certified organic farm can easily be determined from the producer's organic certificate. The National Organic Program ("NOP") rules require that any USDA accredited certifying agent, that issues a certificate after an inspection of a farm, must specifically identify the "Categories of organic operation, including crops, wild crops, livestock or processed produced by the certified operation." *See* 7 C.F.R. §205.404(b) Any commodity board may easily determine that the producer is a certified producer of a particular commodity. Of course, both the Dairy Milk Promotion Order and the Fluid Milk Promotion Order, address only milk and milk products. *See* 7 C.F.R. §1150.111-113 (defining milk, fluid milk and milk products); 7 C.F.R. §1150.107-09 (defining fluid milk product, fluid milk processor and milk) All of CROPP's producers possess organic certificates bearing product designations that conform to the categories of the two existing research and promotion programs.

Congress intended the Exemption Statute exempt "any agricultural commodity that is produced on a certified organic farm (as defined by section 6502 of this title)." By referencing the OFPA, Congress explicitly *did not* limit such exemption in the event of approved split operations. To the extent the proposed rule contains an example that suggests that products from split-operations approved under the OFPA and certified by an USDA accredited certifying agent are ineligible for the Statutory Exemption, the proposed rule would create unnecessary conflict with the OFPA. *Compare* 7 U.S.C. §6502(5) (definition "organically produced") with 7 U.S.C. §6502(4)(certified organic farm means "a farm, or portion of a farm") and 7 U.S.C. §6502(10)(certified organic handling operation means "any operation or portion of an operation); *See* 7 C.F.R. §205.2 (split operation means "An operation that produces or handles both organic and non-organic agricultural products.") Thus, it is the nature and legal status of the agricultural commodity that is the touchstone of eligibility under Congress' approach because both Congress and the Secretary have already determined a "split-operation" may produce 100% certified organic products. To construe the Exemption Statute to the contrary would create irrevocable conflict with the OFPA.

Moreover, under certain circumstances, even a farmer that does not operate a split-operation, may be compelled to sell products from his organic farm in conventional sales channels. *See e.g.* 7 U.S.C. 6506(b)(2)(discretion to adopt provisions regarding "federal or state emergency" spray programs); 7 C.F.R. § 205.2(definition of emergency pest or disease treatment program); 7 C.F.R. 205.238(c)(7) (barring organic livestock producer from withholding healthcare to maintain organic status of animal; mandating diversion to conventional market); 7 C.F.R. § 205.290 (Temporary Variances)(listing

conditions under which suspension of requirements may occur); 7 C.F.R. § 205.101(a)("exemptions); 7 C.F.R. § 205.2(a)(definition of "drift"); 7 C.F.R. § 205.272 (prohibiting commingling of organic products with "nonorganic products" and prohibited materials). In the Exemption statute Congress focused on providing relief to certified entities that produce and market certified organic products, and limited the reach of the exemption only by requiring that the person seeking relief demonstrate the commodity for which assessment relief is sought is produced and marketed as organic under the OFPA. No other limitation was adopted and no other limitation should be imposed.

The examples appearing in the comments submitted by Horizon Organic Dairy ("HOD") are adopted herein because they succinctly describe several absurd results that may arise from the proposed rule's failure to tightly focus on the organic status of the *specific commodity* for which the exemption is sought. In the case of both HOD and CROPP Cooperative, their certified organic dairy producers are eligible for exemption without regard to the commercial sale of organic non-dairy commodities from the dairy farm, or the production and sale of non-organic, non-dairy commodities, or the sale of organic dairy products through conventional sales channels.

If carried forward to the Final Rule, the Secretary's examples appearing in the proposed rule will result in a rule that frustrates and blocks the full reach of the exemption by artificially constraining the eligibility of certified organic producers. If a certified organic farmer produces all of his dairy products organically, then he is eligible for the exemption as applied to any dairy-product based assessment. If that farmer produces non-organic honey or meat or corn (none of which are governed by the commodity promotion law for which exemption is sought) he is still eligible for the exemption on the program crop. Additionally, if that farmer must divert an animal or a crop product to the conventional market in order to comply with the organic rules as discussed above, that would not constitute a disqualifying sale because such a construction would impermissibly penalize the farmer for compliance with the National Organic Program's rules. It would be absurd to conclude that Congress intended a farmer would lose the entitlement to an exemption created for organic farmers *when in full compliance with the Secretary's organic program.*

D. An Organic Product Does not Lose its Legal Status as the Product of a Certified Organic Farm When it is Transacted in the Conventional Marketplace and such Sale Does Not Impact the Eligibility for the Exemption.

In passing the Exemption statute, Congress demonstrated that it recognized that the current commodity promotion laws assist in the marketing of conventional products, and that the organic marketplace represents a separate marketing effort. Congress's focus in the statute was to provide relief to any "producer who *produces and markets* solely 100 percent organic products and *does not produce* any conventional or non-organic products." Eligibility for the exemption turns, not on the label or the ultimate sales channel, but on the certified organic status of the commodities. As a policy matter, because the farmer does not market the commodity in the conventional marketplace, the

farmer does not benefit from the commodity promotion laws, and is therefore within the policy contours of the exemption. As a legal matter, a certified organic product does not lose its legal status because it is transacted in the conventional marketplace nor does the farmer or handler lose their certification as a result of such sale. To construe the Exemption statute in a manner that restricts eligibility for the exemption based on a transaction that does not and cannot change the fact that the product was produced on a certified organic farm, would be manifestly contrary to the plain meaning of the Exemption statute.

As noted above, the proposed rule leaves open the possibility that eligibility for the Exemption may be eliminated if a certified organic producer is forced, in an isolated instance, to sell a certified commodity on the conventional market. For example, if a dairy farmer is forced to give an animal antibiotic treatment, for humane purposes (required by the Organic Food Production Act), the farmer must then sell the animal conventionally. This cannot result in a loss of eligibility for the exemption. Nor should the farmer lose the exemption if a farmer's certified organic product is ultimately sold without an organic label or with an organic label, but on the conventional market, either by a third party down the supply stream, or from the farm because of a lack of an adequate organic market. If the farm maintains its organic certification, there is no reason the farmer should not be exempt from the assessments on the commodity produced, and be able to concentrate his marketing efforts and marketing dollars in the organic marketplace, as Congress intended.[3]

A certified organic producer who produces 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply qualifies for the exemption without regard to whether the commodity is ultimately sold with an "organic" label or disposed of it in the conventional marketplace. Congress did not intend to bar eligibility for the exemption if a certified organic product is transacted in the conventional marketplace. In that situation the product remains an organic product and would not run afoul of the limited bar on production and direct sale of nonorganic products. The fact that the certified organic product does not transact in the organic marketplace is irrelevant as to its organic nature at the time it was produced.

E. An Organic Certificate from a USDA Accredited Certifying Agent Contains Sufficient Information to Permit any Commodity Board to Determine Eligibility for the Exemption and No Additional Paperwork Should be Required

The Proposed Rule includes a new 7 C.F.R. §1150.157 that provides:

> (b) To apply for an exemption under this section, a producer pursuant to Sec. 1150.152(a) and (b) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as

[3] Congress left open the possibility that in the future assessment monies may be aggregated by organic producers and handlers to pursue separate marketing efforts for the organic marketplace.

> the producer continues to be eligible for the exemption. (c) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), and a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption.

See Proposed Rule at 22694-95 The Proposed rule suggests this form-based approach,

> [R]equires the minimum information necessary to effectively administer the exemption provision, and its use is necessary for compliance purposes.

Proposed Rule at 22692. CROPP respectfully suggests that the Secretary amend this proposed approach by requiring only that the eligible entity provide its organic certificate issued by an USDA accredited certifying agent rather than a separate form bearing a separate signed certification by the eligible entity. The organic certificate contains all of the information required to determine eligibility, and significantly reduces the paperwork burden. *See* 7 C.F.R. 205.404(3)(requiring that the organic certificate include "Categories of organic operation; including crops, wild crops, livestock or processed products produced by the certified operation.")

Moreover, the potential for confusion exists because the Proposed Rule requires that the certified producer issues its own statement confirming the following:.

> (a) A producer described in Sec. 1150.152(a) and (b) who produces and markets solely 100 percent organic products and does not produce any conventional or non-organic products shall be exempt from the payment of assessments on milk provided the milk is produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502)

See Proposed Rule at 22694. This provision relies on the Exemption statute's terminology and that language differs from the typical language used by USDA's certifying agents. Certified organic producers may be confused by this shift in terminology and this problem is easily avoided by use of the organic certificate.

Finally, the separate requirement that the eligibility for exemption be re-determined on an annual basis would be unnecessary if the organic certificate is used. *See* 7 C.F.R. §205.404(c) ("Once certified, a production or handling operation's organic certification continues in effect until surrendered by the organic operation or suspended or revoked by the certifying agent, the State organic program's governing State official or the Administrator.") The existing organic certification is sufficient to demonstrate eligibility for the Exemption proposed by Congress and reliance thereon eliminates the additional

burden on producers, and the burden on each commodity board to develop its own form. Reliance on the standardized approach to organic certificates would eliminate this issue.

F. The Final Rule Must Exempt Fluid Milk Processors That Receive and Market Only Organic Products.

The Proposed Rule includes an amendment to the National Fluid Milk Promotion Order 7 C.F.R. Part 1160.215, allowing for the exemption from the assessment for any fluid milk processor who produces and markets solely 100% organic products, and who does not produce any conventional or non-organic products.[4]

> (b) A fluid milk processor described in Sec. 1160.211(a) who produces and markets solely 100 percent organic products, and who does not produce any conventional or non-organic products, shall be exempt from the payment of assessments on fluid milk products produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502). For purposes of this section, produce means to grow or produce food, feed, livestock, or fiber or to receive food, feed, livestock, or fiber and alter that product by means of feeding, slaughtering, or processing.

See Proposed Rule at p. 22695 The discussion of the Regulatory Flexibility Act in the proposed rule indicates that the Secretary did not identify any fluid milk processors that would be eligible for the assessment.[5] *See Proposed Rule at p. 22693* (Regulatory Flexibility Act analysis; valuing at zero the estimated fluid milk processor exemption amount) Apparently the Secretary concluded that no certified organic handler of fluid milk would meet the eligibility criteria set forth above, and thus none qualify for an exemption from assessments imposed under the National Fluid Milk Promotion Order.

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[4] The proposed rule's definition of the class of eligible persons irrefutably includes fluid milk processors like CROPP Cooperative. First, "To be eligible for an exemption, the person must be subject to an assessment under a research and promotion program." *Proposed Rule* at p. 22691 Second, "person" includes, "an individual, group of individuals, corporation, association, cooperative, or other business entity." *Id.* Third, eligible persons include "handlers, first handlers, processors..." *Id.* Fourth, such persons "must possess certification from a USDA-accredited certifying agent and certify that the farm or handling operation meets the requirements of 100 percent organic as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502)." *Id.* Finally, the definition of "fluid milk processor" appearing in 7 CFR 1160.211 provides, "Each fluid milk processor shall pay to the board....an assessment...."

[5] The proposed rule noted, "No respondents were identified for the fluid milk, popcorn, and egg programs. * * * Among assessment payers, no solely 100 percent organic processors or producers are known;" *Proposed Rule at 22693*

No explanation for this conclusion appears in the text of the proposed rule. In the absence of a stated rationale, CROPP believes the erroneous conclusion is the result of one or two misconceptions, each of which may be readily cleared up. As is demonstrated below, CROPP Cooperative, and other certified organic fluid milk processors similarly situated, are eligible persons under the Exemption statute and are entitled to the exemption.

First, it is possible that the Secretary mistakenly believes that the use by certified organic fluid milk processors like CROPP Cooperative of processing facilities that handle organic and conventional processing, as designated agents for the purposes of administering the assessments, disqualifies the certified organic processor because non-organic products are handled at that *facility*. Second, it is possible that the Secretary mistakenly determined that organic fluid milk that is not typically labeled "100% organic" under the National Organic Program ("NOP") labeling rules appearing at 7 CFR §205.301(a) but instead is labeled "organic milk" under 7 CFR §205.301(b), disqualifies its processor from eligibility because Section 10607 requires the processor's milk be *labeled* "100% organic." Each is addressed separately below.

1. If a Processor Currently Pays the Assessment, and The Products It Markets Are 100% Organic, the Processor is Now Eligible For the Exemption

CROPP Cooperative and similarly situated organic fluid milk processors are eligible for the assessment relief. CROPP Cooperative meets the definition of a person that pays an assessment, is certified by an accredited certifying agent of the USDA, and does not produce or market any dairy products except ones produced on certified farms and handled by certified handlers thus meeting the Exemption statute's requirements of "100 per cent organic" products and the absence of non-organic products. Finally CROPP meets the definition of a fluid milk processor under the Fluid Milk Promotion Order, as a "person who processes and markets commercially fluid milk products in consumer-type packages in the United states..." 7 C.F.R. 1160.108. As stated above, CROPP Cooperative's "Organic Valley" label is the nation's largest farmer-owned certified organic brand. CROPP Cooperative's membership produces 100% organic milk, all of which is marketed through the cooperative, which purchases the milk from the farmers and is responsible for all processing and marketing of the milk. CROPP Cooperative pays the 20 cent promotion fees currently, through its designated agent, and therefore is eligible for the exemption. The fact that the *facility* of the designated agent which CROPP Cooperative or any other organic fluid milk processor chooses to use, does not handle 100% organic products cannot disqualify the processors from the exemption.

2. Congress was not Referring to the National Organic Program Labeling Rules when it Limited Eligibility for the Exemption to those Persons that Produce and Market Solely 100% Organic Products.

Congress's eligibility restriction on the Exemption to those persons that produce and market "solely 100 per cent organic products, and that does not produce any conventional or non-organic products" should not be confused with the federal organic labeling rules for several reasons.

First, Congress chose to require "100 per cent organic products" rather than "products that are labeled 100% organic." *See* 7 CFR §205.301(a) In other words, Congress expressly declined to use the NOP labeling term "100% organic."[6] That manifest expression of Congressional intent to *avoid* the agency's labeling matrix should end the interpretive inquiry right there.

> [i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S 837, 842-43 (1984)

Second, the "100% organic" label is one of several labeling provisions governing organic products under the NOP rules, demonstrating that many different formulations meet the dictates of the OFPA. *See e.g.* 7 C.F.R. §205.301(a-d) Third, the labeling categories adopted in the NOP rule, such as "100% organic" do not themselves appear in the OFPA and are solely for the purpose of ensuring that "agricultural products and ingredients are consistently labeled to aid consumers in selection of organic products and to prevent labeling abuses." *See Final Organic Rule at pg. 108.* Fourth, each of the labeling categories appearing at 7 C.F.R. §205.301(a-d) describe with greater specificity the ingredients in a product, but have nothing to do with the certification of a producer or handler. *See e.g* 7 C.F.R. 205.2 (definition of "certified" and "certified operation" do not refer to labeling); 205.2 (definition of "organic" means "produced in accordance with the Act and regulations"); 7 U.S.C. 6510(a)(4)(permitting organic certification to handlers that add not more than 5% non-organic ingredients to products). This can only mean that the requirement that the products be certified by an accredited agent is the touchstone of eligibility and the particular labeling category into which a particular product may fall is legally irrelevant.

Accordingly, when Congress used the phrase "100% organic products" it imposed a requirement that a person's entire product line must be certified as organically produced and handled under the OFPA, and it *did not* refer to the labeling provisions that merely distinguish between the organic products bearing various percentages of organic

[6] This is readily confirmed upon examining the National Organic Program rules regarding labeling that appear at 7 C.F.R. Part 205. *See e.g.* 7 C.F.R. §205.301 (Product Composition authorizing label to read "100% organic" when the "raw or processed agricultural product....contain[s] (by weight or volume, excluding water or salt) 100% organically produced ingredients"); *see* 7 C.F.R. §205.303(1) (Packaged products labeled "100% organic" or "organic") (on packaged products, "100 percent organic" is synonymous with "organic"); *see* 7 C.F.R. §205.307 (rules regarding labeling of containers the same for "100% organic" and "organic" products); *see also* 7 C.F.R. §205.308 (rules regarding labeling for non-packaged products the same for products claiming "100% organic or organic")

ingredients. This conclusion is significantly bolstered by the OFPA because Congress *did not adopt* the labeling categories later adopted in the NOP rule, but instead explicitly determined, for instance, that organic products may have up to 5% non-organic ingredients and be just as organic as those products with all organic ingredients. *See* 7 U.S.C.A. §6510(a)(4) Thus when Congress refers to producing and marketing "100 per cent" organic products, it clearly intends that every product the person markets be within the jurisdictional purview of the OFPA but not within a particular labeling category because the labeling categories *do not exist in the statute.* Most importantly, Congress did not intend to restrict the exemption to only those persons that choose to label products as "100% organic."

III. Conclusion

For the foregoing reasons CROPP Cooperative respectfully requests that the Secretary amend its Proposed Rule to follow the well settled commodity by commodity approach when determining eligibility for exemptions to ensure that the relief provided by Congress is as widely available as was intended and further amend the Proposed Rule by affording relief to certified organic fluid milk processors as is consistent with the Exemption statute's plain meaning and intent of Congress.

Respectfully submitted,

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